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11 **United States District Court**
12 **Central District of California**
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14 CORE FOCUS CONSULTING 2, LLC,
15 Plaintiff,
16 v.
17 RENEWAGE ENERGY SOLUTIONS,
18 INC.,
19 Defendant.

Case No. 2:24-cv-01809-ODW (RAOx)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
THIRD CAUSE OF ACTION [21]**

21 **I. INTRODUCTION**

22 Plaintiff Core Focus Consulting 2, LLC ("CFC2") brings this action against
23 Defendant RenewAge Energy Solutions, Inc. ("RenewAge"), alleging breach of
24 contract, unjust enrichment, civil theft pursuant to California Penal Code section 496
25 ("Section 496"), and conversion. (Compl., ECF No. 2.) Under Federal Rules of Civil
26 Procedure ("Rules" or "Rule") 12(b)(6) and 9(b), RenewAge now moves to dismiss
27 CFC2's third cause of action for civil theft. (Mot. Dismiss ("Mot." or "Motion"), ECF
28 No. 21.) For the reasons below, the Court **GRANTS** Defendant's motion **WITH**

1 **LEAVE TO AMEND.¹**2 **II. BACKGROUND²**

3 CFC2 is an energy consulting company that offers project management services.
 4 (Compl. ¶ 10.) In 2017, Union Bank retained CFC2’s services to install specialized
 5 lighting at various Union Bank locations (the “Union Bank Lighting Project”). (*Id.*
 6 ¶ 17.) Following a renegotiation of the project agreement in 2021, CFC2 enlisted the
 7 services of Redaptive—a company specializing in financing energy efficiency
 8 projects—to provide funding for the project. (*Id.* ¶¶ 16–18.) As the Union Bank
 9 Lighting Project’s project manager, CFC2 managed the relationship between Union
 10 Bank and Redaptive. (*Id.* ¶ 18.)

11 RenewAge is an electrical contractor that installs various types of electrical
 12 equipment and systems. (*Id.* ¶ 12.) In 2021, Jim Nork, the President and Chairman of
 13 CFC2, entered into a Memorandum of Understanding (“MOU”) with Envision Impact
 14 Ventures (“EIV”), the parent company of RenewAge. (*Id.* ¶ 15.). Under the terms of
 15 the MOU, CFC2 would use its “specialized business and client relationships [and]
 16 investment contracts” to “[c]ontribute to the overall growth of [EIV].” (*Id.* (alterations
 17 in original).) Among CFC2’s “specialized” relationships and contracts were those with
 18 Union Bank and Redaptive through the Union Bank Lighting Project. (*Id.* ¶ 16.)

19 In or sometime after 2021, CFC2 selected RenewAge to perform the hardware
 20 installation and maintenance for the Union Bank Lighting Project. (*Id.* ¶ 20.) As part
 21 of the selection process, CFC2 and RenewAge “engaged in discussions . . . about
 22 potential avenues for cooperation” and subsequently made a “verbal agreement” to
 23 jointly bill Redaptive on behalf of both RenewAge and CFC2 for the work performed
 24 on the Union Bank Lighting Project. (*Id.* ¶¶ 22–23.)

25
 26 ¹ Having carefully considered the papers filed in connection with the Motion, the Court deemed the
 matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

27 ² The following facts are taken from CFC2’s Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678
 28 (2009) (stating that well-pleaded factual allegations are accepted as true for purposes of a motion to
 dismiss).

1 The Union Bank Lighting Project was separated into eight Project Groups. (*Id.*
 2 ¶ 24.) Each Project Group consisted of multiple Union Bank locations and an
 3 accompanying “Project Addendum” outlining the allocation of duties, the specifics of
 4 implementing the Lighting Project at a given project site, and the breakdown of payment
 5 for the parties’ respective services. (*Id.*) The parties established a procedure whereby
 6 RenewAge would invoice Redaptive for all funds pertaining to the relevant Project
 7 Group, CFC2 would invoice RenewAge for its portion of the funds earned for its work
 8 on the Project Group, and then, once RenewAge received payment from Redaptive,
 9 RenewAge would settle CFC2’s invoice. (*Id.* ¶ 26.) Upon the conclusion of a Project
 10 Group, Union Bank was to “sign off” on its satisfactory completion. (*Id.*)

11 For the first five Project Groups, RenewAge submitted joint invoices to
 12 Redaptive, Redaptive paid the invoices, and RenewAge passed through to CFC2 its
 13 portion of the funds earned in accordance with their procedure. (*Id.* ¶¶ 24–27.) Then
 14 again, for Project Groups 6, 7, and 8, RenewAge and CFC2 completed the projects to
 15 Union Bank’s satisfaction, RenewAge jointly invoiced Redaptive \$999,945.95 for the
 16 work performed, and Redaptive paid RenewAge’s invoice. (*Id.* ¶¶ 34–35.) On
 17 April 28, 2023, CFC2 invoiced RenewAge for \$234,280.51 for CFC2’s work on Project
 18 Groups 6–8. (*Id.* ¶¶ 5, 34.) However, unlike with the first five Project Groups,
 19 RenewAge did not pay CFC2’s invoices for Project Groups 6–8. (*Id.* ¶ 36.)

20 CFC2 has since made several demands to RenewAge for payment of the invoices,
 21 initially with several emails and later with demand letters sent by CFC2’s counsel. (*Id.*
 22 ¶¶ 5, 36–37.) All of CFC2’s communications have gone unanswered. (*Id.* ¶¶ 5, 37.)
 23 CFC2 contends that RenewAge has withheld the portion of funds paid by Redaptive
 24 that were allegedly intended for CFC2’s share of the work completed. (*Id.* ¶¶ 28–37.)

25 On March 6, 2024, CFC2 filed this suit, alleging four causes of action arising out
 26 of RenewAge’s nonpayment of CFC2’s invoice for Project Groups 6–8: (1) breach of
 27 contract, (2) unjust enrichment, (3) civil theft pursuant to Section 496, and
 28 (4) conversion. (*Id.* ¶¶ 38–71.) RenewAge now moves to dismiss CFC2’s third cause

1 of action for civil theft for failure to state a claim upon which relief can be granted under
 2 Rule 12(b)(6) and for failure to satisfy the heightened pleading standard for fraud under
 3 Rule 9(b). (*See generally* Mot.)

4 III. LEGAL STANDARD

5 A. Rule 12(b)(6) Generally

6 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
 7 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
 8 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To
 9 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading
 10 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v. Jones*,
 11 319 F.3d 483, 494 (9th Cir. 2003). The “[f]actual allegations must be enough to raise a
 12 right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 13 555 (2007). That is, the complaint must “contain sufficient factual matter, accepted as
 14 true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678
 15 (internal quotation marks omitted).

16 The determination of whether a complaint satisfies the plausibility standard is a
 17 “context-specific task that requires the reviewing court to draw on its judicial
 18 experience and common sense.” *Id.* at 679. A court is generally limited to the pleadings
 19 and must construe all “factual allegations set forth in the complaint . . . as true and . . .
 20 in the light most favorable” to the plaintiff. *Lee v. City of Los Angeles*, 250 F.3d 668,
 21 679 (9th Cir. 2001). However, a court need not blindly accept conclusory allegations,
 22 unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden State
 23 Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

24 B. Pleading Fraud Under Rule 9(b)

25 Claims sounding in fraud must also comply with the heightened pleading
 26 requirements of Rule 9(b). *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 701
 27 (9th Cir. 2012). Rule 9(b) provides: “In alleging fraud or mistake, a party must state
 28 with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).

1 The heightened pleading requirements of Rule 9(b) are designed “to give defendants
2 notice of the particular misconduct which is alleged to constitute the fraud charged so
3 that they can defend against the charge and not just deny that they have done anything
4 wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). “A pleading satisfies
5 Rule 9(b) if it identifies ‘the who, what, when, where, and how’ of the misconduct
6 charged.” *MetroPCS v. SD Phone Trader*, 187 F. Supp. 3d 1147, 1150 (S.D. Cal. 2016)
7 (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). The
8 plaintiff must “set forth more than the neutral facts necessary to identify the transaction
9 [but rather] what is false or misleading about a statement, and why it is false.” *Vess*,
10 317 F.3d at 1106.

IV. DISCUSSION

12 RenewAge moves to dismiss CFC2’s third cause of action for civil theft, arguing
13 that CFC2 has not met the heightened pleading standard required by Rule 9(b).
14 Although the Ninth Circuit has not expressly held that Rule 9(b) applies to civil theft
15 claims under Section 496, sister courts within this district routinely apply Rule 9(b) to
16 similar claims under Section 496. *See, e.g., B.K. v. Desert Care Network*, No. 2:23-cv-
17 5021-SPG (PDx), 2024 WL 1343305, at *10 (C.D. Cal. Feb. 1, 2024); *Grouse River*
18 *Outfitters Ltd v. NetSuite, Inc.*, No. 16-CV-02954-LB, 2016 WL 5930273, at *14
19 (N.D. Cal. Oct. 12, 2016) (dismissing a Section 496 claim because, among other
20 reasons, the plaintiff “did not identify false representations or plead fraud with
21 particularity” to satisfy Rule 9(b)). The Ninth Circuit has held that when a claim is
22 “grounded in fraud,” or “sound[s] in fraud,” it must meet the particularity requirement
23 of Rule 9(b). *See Vess*, 317 F.3d at 1103–04. In the present case, neither party disputes
24 that CFC2’s Section 496 civil theft claim “sounds in fraud,” thereby subjecting it to the
25 heightened pleading requirement of Rule 9(b).

26 Section 496 allows any person to bring a civil claim against another who “buys
27 or receives any property that has been stolen or that has been obtained in any manner
28 constituting theft or extortion, knowing the property to be so stolen or obtained,” or

1 “conceals, sells, withholds, or aids in concealing, selling, or withholding any property
 2 from the owner, knowing the property to be so stolen or obtained.” Cal. Penal Code
 3 § 496(a), (c). To plead a violation under Section 496(a), a plaintiff must establish:
 4 “(1) that the particular property was stolen, (2) that the accused received, concealed or
 5 withheld it from the owner thereof, and (3) that the accused knew that the property was
 6 stolen.” *Finton Constr., Inc. v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200, 213
 7 (2015). California Penal Code section 484 (“Section 484”) enumerates the specific acts
 8 that constitute theft for the purposes of Section 496(a).

9 In its Motion, RenewAge argues that CFC2 does not plead its Section 496 claim
 10 with the requisite particularity to satisfy Rule 9(b)’s heightened pleading standard. For
 11 the following reasons, the Court finds CFC2’s civil theft claim does not meet
 12 Rule 9(b)’s heightened pleading standard because CFC2 failed to plead with
 13 particularity (1) a false representation constituting civil theft or (2) Section 496’s
 14 scienter requirement. The Court addresses each in turn.

15 **A. False Representation**

16 First, the Court considers whether CFC2 sufficiently pleads that RenewAge
 17 obtained CFC2’s property through some false representation, pretense, or trick that
 18 constituted civil theft. The parties disagree as to whether CFC2’s Section 496 claim
 19 relies on a theory of “theft by false pretenses” or “larceny by trick and device.” (See
 20 Mot. 9–11; Opp’n 3–6, ECF No. 24.) However, whether CFC2’s civil theft claim is
 21 characterized as false pretenses or larceny by trick has no material impact on the
 22 resolution of RenewAge’s Motion.

23 The theories of theft by false pretenses and larceny by trick or device are
 24 substantially similar in the context of a Section 496 claim. *See People v. Traster*,
 25 111 Cal. App. 4th 1377, 1387–88 (2003); *see also* Cal. Penal Code § 484 (outlining the
 26 elements of both theories). The only distinguishing factor between the two theories is
 27 whether the fraud results in the acquisition of “title” or “possession” of the property.
 28 *Traster*, 111 Cal. App. 4th at 1387–88. (finding that theft by false pretenses involves

1 acquiring both “title and possession,” while larceny by trick and device involves merely
 2 “obtain[ing] possession of property for a specific or special purpose”). Both theories
 3 involve the defrauding of another, whether by “trick and device” or “false pretense,”
 4 and are therefore “grounded in fraud” and subject to the particularity requirement of
 5 Rule 9(b). *See Vess*, 317 F.3d at 1103–04.

6 To substantiate its Section 496 claim, CFC2 relies on RenewAge’s alleged “false
 7 representation” to fraudulently obtain CFC2’s property. (Compl. ¶¶ 21–22; Opp’n 7.)
 8 Accordingly, CFC2 must “state the time, place, and specific content of the false
 9 representations” and “the identities of the parties to the misrepresentation.” *Edwards v.*
 10 *Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). The complaint must set forth
 11 “what is false or misleading about [the] statement, and why it is false.” *Vess*, 317 F.3d
 12 at 1106 (requiring more than “neutral facts necessary to identify the transaction”).

13 Here, CFC2 alleges that in or sometime after “renegotiating the finance
 14 agreement” to engage Redaptive’s services in 2021, the parties “engaged in
 15 discussions . . . about potential avenues for cooperation and coordination.” (Compl.
 16 ¶¶ 17, 21.) As a result of these discussions, CFC2 alleges the parties “entered into a
 17 verbal agreement” that “RenewAge would bill Redaptive for the services provided by
 18 both companies [on the Union Bank Lighting Project] and, upon receipt of payment
 19 from Redaptive, RenewAge would pass through” CFC2’s portion of the payment. (*Id.*
 20 ¶¶ 22–23.) CFC2 contends that RenewAge then used this agreement to “fraudulently
 21 appropriate[] CFC2’s property” by submitting invoices to Redaptive including work
 22 performed by both parties “under the *false pretense* that RenewAge would pay to CFC2
 23 the portion of the funds CFC2 had earned.” (*Id.* ¶ 62 (emphasis added).) CFC2 asserts
 24 that “both CFC2 and Redaptive trusted that RenewAge would abide [by] its
 25 agreement . . . because the agreement had been operating as intended for the first 5
 26 Project Groups.” (Opp’n 8.)

27 CFC2 fails to plead with sufficient particularity the time, place, and specific
 28 content of these purported false representations. For example, CFC2’s allegations that

1 the parties “engaged in discussions” sometime after “renegotiating the finance
 2 agreement” in 2021 is entirely devoid of temporal meaning. It is unclear when or how
 3 often these discussions occurred, what was discussed besides “potential avenues for
 4 cooperation,” who within the two companies was involved in these discussions, or when
 5 the subsequent “verbal agreement” was made. *See, e.g., R Power Biofuels, LLC v.*
 6 *Chemex LLC*, No. 16-CV-00716-LHK, 2016 WL 6663002, at *14 (N.D. Cal. Nov. 11,
 7 2016) (finding “allegations of ‘repeated’ conversations over an eight-month time
 8 frame” insufficient to plead the alleged misrepresentations with particularity).
 9 Furthermore, CFC2 does not articulate how RenewAge’s nonperformance of the
 10 “verbal agreement” for RenewAge to “pass through” CFC2’s portions of the funds after
 11 jointly billing Redaptive constitutes a false representation or amounts to anything more
 12 than a breach of contract. Lastly, while CFC2 adequately identifies the invoices in
 13 question, it does not clarify how submitting invoices to Redaptive including work
 14 performed by both parties constitutes a “false representation” without proof that the
 15 invoices were submitted with fraudulent intent.

16 Thus, because CFC2 fails to identify the factual content of the purportedly false
 17 representation and falls short of pleading such allegations with particularity, CFC2’s
 18 Section 496 claim does not satisfy Rule 9(b)’s heightened pleading standard.

19 **B. Scienter**

20 Next, the Court examines whether CFC2 sufficiently alleges the third element of
 21 its Section 496 claim—that RenewAge knew the funds were stolen (*i.e.*, the “**Scienter**”
 22 requirement)—with the particularity mandated by Rule 9(b). CFC2 contends that
 23 RenewAge collected on the joint invoice for Project Groups 6, 7, and 8 “with *full*
 24 *knowledge* that it would then withhold these funds from CFC2.” (Compl. ¶ 63
 25 (emphasis added).) CFC2 attempts to demonstrate RenewAge’s knowledge of the
 26 stolen funds with three separate allegations: (1) RenewAge “knew the funds it
 27 received . . . did not belong to it” because it completed payment on Project Groups 1–
 28 5, (2) RenewAge “knew it was not entitled to keep the funds” because CFC2 sent

1 “multiple emails demanding payment of its invoices” under Project Groups 6–8, and
 2 (3) RenewAge knew its conduct constituted theft because of the “demand letter [sent to
 3 RenewAge by CFC2’s counsel] warning that if it did not release the funds to CFC2,
 4 CFC2 would file a lawsuit for civil theft.” (Compl. ¶ 65–66.)

5 Contrary to CFC2’s assertion, fraud allegations elicit a more demanding standard
 6 under Rule 9(b) to satisfy the scienter element of a Section 496 claim than simply
 7 pointing to the defendant’s prior conduct and failure to perform on a promise as
 8 evidence of fraudulent intent. Certainly, “[a] promise made without intention to
 9 perform can be actionable fraud.” *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152
 10 (S.D. Cal. 2001). However, to satisfy Rule 9(b)’s heightened pleading standard, a
 11 plaintiff must allege facts “which show that defendant harbored an intention not to be
 12 bound by terms of the contract at formation” and from which the court “can infer that
 13 the allegedly fraudulent statements were actually false when made.” *Hsu v. OZ Optics
 14 Ltd.*, 211 F.R.D. 615, 620 (N.D. Cal. 2002); *Richardson v. Reliance Nat. Indem. Co.*,
 15 No. C 99-2952 CRB, 2000 WL 284211, at *5 (N.D. Cal. Mar. 9, 2000); *see also In re
 16 GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549, 1549 n.9 (9th Cir. 1994) (finding a
 17 plaintiff may prove the defendant’s statement was “untrue or misleading *when made*”
 18 by “pointing to inconsistent contemporaneous statements or information . . . which was
 19 made by or available to the defendant[]” or “later statements made by the defendant
 20 along the lines of ‘I knew it all along’”). Put plainly, “fraudulent intent cannot be
 21 proven . . . by simply pointing to the defendant’s subsequent failure to perform as
 22 promised.” *Smith*, 160 F. Supp. 2d at 1152 (citing *Tenzer v. Superscope, Inc.*, 39 Cal.3d
 23 18, 30–31 (1985) (holding that if a plaintiff “adduces no further evidence of fraudulent
 24 intent than proof of nonperformance of an oral promise, [they] will never reach a
 25 jury”)).

26 Here, CFC2 fails to present any facts, statements, or conversations that
 27 demonstrate that RenewAge did not intend to perform at the time the agreement was
 28 made or had knowledge that the funds were stolen. CFC2 references a “verbal

1 agreement” that the parties would jointly invoice Redaptive for their work on the Union
 2 Bank Lighting Project and that RenewAge completed payment on Project Groups 1–5.
 3 (Compl. ¶¶ 22–23.) However, CFC2 does not explain how this agreement and prior
 4 performance translates to “full knowledge” RenewAge would withhold the funds from
 5 Projects 6–8 from CFC2. (*Id.* ¶¶ 21–22, 63).

6 Furthermore, RenewAge’s failure to respond to CFC2’s “multiple emails
 7 demanding payment of its invoices” and the “demand letter” sent by CFC2’s counsel
 8 does not prove that RenewAge knew it acted with scienter at the time of the alleged
 9 conduct (nor does it demonstrate RenewAge’s “guilty conscience”). (*Id.* ¶ 66.) CFC2
 10 offers no factual basis demonstrating an intent to forego performance at the time the
 11 agreement was made, other than allegations relating to RenewAge’s post-agreement
 12 conduct and failure to perform as promised. As such, CFC2 fails to plead the scienter
 13 element of a Section 496 claim with the particularity required by Rule 9(b) in the
 14 absence of any facts demonstrating RenewAge knew it was stealing CFC2’s funds.

15 Therefore, CFC2’s Section 496 civil theft claim also fails because it did not
 16 sufficiently allege a false representation or the scienter requirement with the
 17 particularity required by Rule 9(b)’s heightened pleading standard.

18 V. CONCLUSION

19 For the reasons discussed above, the Court **GRANTS** RenewAge’s Motion to
 20 Dismiss CFC2’s third cause of action **WITH LEAVE TO AMEND**. (ECF No. 10.) If
 21 CFC2 chooses to amend, the First Amended Complaint is due no later than **twenty-one**
 22 **days** from the date of this Order, in which case RenewAge shall answer or otherwise
 23 respond within **fourteen days** of the filing. If CFC2 does not timely amend, the

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1 dismissal shall be deemed a dismissal with prejudice as of the lapse of the deadline to
2 amend.

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4 **IT IS SO ORDERED.**

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6 July 10, 2024

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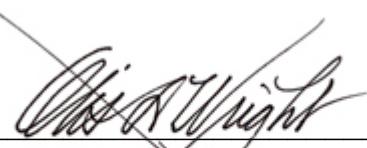
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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE